'A powerful thing': Exploring the participation of children and young people in special educational needs mediation

Ben Walsh[*]

Introduction

The new Special Educational Needs and Disability (SEND) Code of Practice (2015) provides statutory guidance on duties and policies on Part 3 of the Children and Families Act 2014, which provides the statutory basis for the reforms to special educational needs (SEN) in England that came into force on 1 September 2014.

The introduction of the new Code heralded a legislative commitment to improving the quality of support through the principles of engaging children and young persons (CYPs) in decision-making.[1] Section 1.1 of the Code makes clear that local authorities (LAs) must 'have regard to the views, wishes and feelings of the child', stressing the importance of the child 'participating as fully as possible in decisions' and 'being provided with the information and support necessary to enable participation in those decisions'.[2]

Section 1.6 states that

> 'Children have a right to receive and impart information, to express an opinion and to have that opinion taken into account in any matters affecting them from the early years. Their views should be given due weight according to their age, maturity and capability'.[3]

The Code refers to Article 12 of the United Nations Convention on the Rights of the Child (UNCRC), which is discussed below.

Other key changes are the extension of the Code to include those up to 25 years of age and the transition from statements of SEN to education, health and care plans (EHCPs). EHCPs are legal documents specifying provisions for the individuals to whom they are issued.

The Code also delineates new arrangements for resolving disputes about SEN provision between parents (or young people) and local authorities (LAs). A tribunal system has existed since 1994, with 3,147 appeals registered in the academic year 2014.[4] Parents can now appeal against LA decisions such as refusal to assess for or issue an EHCP, or content-related decisions (such as descriptions of needs, therapy arrangements or school placement specified). A key change is the Code's promotion of free, independent mediation, with the aim of providing early disagreement resolution before the appeal stage. Mediators remain objective, facilitating discussions towards solutions by the parties themselves. The new Code imposes a

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[*] Email: benwalsh@cantab.net.
[1] As defined in section 83 of the Children and Families Act 2014, a young person is a person over compulsory school age but under 25; a child is a person under compulsory school age. Researchers and participants in this study have sometimes used the terms interchangeably.
[2] Department for Education, *Special Educational Needs and Disabilities Code of Practice* (DfE, 2015), p 19.
[3] Ibid, p 20.
[4] Ministry of Justice, *SEND Annual Tables* (Ministry of Justice, 2015).

statutory duty on LAs to make arrangements for mediation. LAs must agree to mediation, although it is voluntary for parents and young people (a decision not to attend mediation does not affect their right of appeal). However, those wishing to appeal may only do so after consulting with a mediation advisor.

Paragraph 11.38 of the Code states that children can attend mediation, although in cases where this is inappropriate, 'the mediator should take reasonable steps… to obtain the views of the child'.[5]

This study considers current practices with regard to CYPs' participation in mediation, exploring parental and professional perspectives on how professionals are implementing the Code at this early stage, alongside some of the barriers and facilitators to CYPs' participation. Terms such as 'participation', 'involvement' and 'listening' refer to how professionals both ascertain and take account of CYPs' views in decisions about educational provision. This study discusses direct attendance and indirect contributions.

Participation of children and young people: what previous studies tell us

There exists a plethora of research highlighting the positive outcomes emerging from CYPs' participation in decisions regarding education.[6] This section discusses attitudes concerning the participation of CYP with SEN in education-related decisions, before turning to the limited research into CYPs' views in SEN disputes.[7]

Perceptions of limited participation

It has been argued that CYPs with SEN are the least listened to and empowered group of pupils.[8] Despite indications of effective practice from educational psychologists,[9] research has suggested that processes around SEN statements and annual reviews have generally neglected authentic pupil voice.[10] In a recent evaluation of the SEND Pathfinder programme, which analysed new EHCP systems across 31 LAs, only a third of families agreed that the CYPs' views had been considered during support planning. Limited consideration of CYPs'

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5 Department for Education, op cit n 2, p 257.

6 J Flutter and J Rudduck, *Consulting Pupils: What's in it for schools?* (Routledge Falmer, 2004)*;* J Rudduck and D McIntyre, *Improving Learning through Consulting Pupils* (Taylor & Francis, 2007*);*
U Mager and P Nowak, 'Effects of student participation in decision making at school. A systematic review and synthesis of empirical research' (2012) 7(1) *Educational Research Review* 38.

7 For a wider discussion of inclusion debates in relation to historical policy and the new Code, see B Norwich, 'Changing policy and legislation and its effects on inclusive and special education: A perspective from England' (2014) 41(4) *British Journal of Special Education* 403.

[8] C Cefai and P Cooper, 'Students without voices: The unheard accounts of secondary school students with social, emotional and behaviour difficulties' (2010) 25(2) *European Journal of Special Needs Education* 183.

[9] E Harding and C Atkinson, 'How educational psychologists record the voice of the child' (2009) 25(2) *Educational Psychology in Practice* 125.

[10] Ofsted, *Annual Report of Her Majesty's Chief Inspector of Education, Children's Services and Skills 2008/9* (The Stationery Office, 2009); L Walker, 'An investigation into young people's perception of special educational needs (SEN) where they have had a statement which ceased' (Doctorate thesis, University of Sheffield, 2008).

views caused particular concern for families of YP (e.g. aged 17+) who were experiencing transition.[11]

Why listen?

Researchers have based a twofold rationale for participation in educational decisions upon rights (a moral and legal obligation) and pragmatism.[12]

<u>Rights</u>

Lundy has stressed that actively involving pupils at all levels of decision-making is a moral and legal imperative. Lundy's work has located discourse on pupil voice within the framework of children's rights, asserting that the strongest argument for guaranteeing participation lies in 'its capacity to harness the wisdom, authenticity and currency of children's lived experience in order to effect change'.[13] The moral case for participation has also been predicated upon the need for inclusive and active citizenship to encompass children.[14] As Fortin has argued, any system which does not ensure this 'would be difficult to justify' to children 'brought up in a society which constantly urges them to develop their powers of critical awareness and to act responsibly and independently'.[15] Lundy's research discusses the state's responsibilities under Article 12 of the UNCRC, which states:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

A helpful model proposed by Lundy clearly conceptualises four distinct facets of Article 12: *Space* (children must be asked which matters they feel impact their lives, asked if/ how they would like to participate in decision-making and given the opportunity to express their views), *Voice* (children must be provided with all necessary information and facilitated to express their views), *Audience* (the views must be listened to) and *Influence* (the views must be acted upon, as appropriate, and the CYP provided with feedback explaining why decisions were taken).[16] Harris has argued that the need to implement the rights enshrined in Article 12 on an equal basis to others is particularly important for those with SEN, a group arguably at greater

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[11] Department for Education, *The Special Educational Needs and Disability Pathfinder Programme Evaluation: Final Impact Research Report* (DfE, 2015).

[12] I Gersch, 'Pupil Involvement in Assessment' in T Cline, *The Assessment of Special Educational Needs: International Perspectives* (Routledge, 1992); N Frederickson and T Cline, *Special Educational Needs, Inclusion and Diversity* (2nd ed.) (Open University Press, 2009).

[13] L Lundy, '"Voice" is not enough: Conceptualising article 12 of the United Nations convention on the rights of the child' (2007) 33(6) *British Educational Research Journal* 927, p 940.

[14] P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008).

[15] J Fortin, *Children's Rights and the Developing Law* (3rd ed.) (Cambridge University Press, 2009), p 315.

[16] Lundy, op cit n 13, p 933.

risk of the denial of such rights.[17] Gibson has also contended that the voices of those with SEN encounter greater difficulty in finding expression.[18] Gibson's work invokes the sociological arguments that 'valid' knowledge is socially constructed through a dominant social group, creating 'outsiders' who cannot access standardised models of shared meanings.[19] Gibson has drawn upon Freire's ideas about a 'Culture of Silence' to argue that lived experiences and genuine voices are excluded, as unchallenged assumptions that SEN professionals hold authority and legitimacy allow them to determine where and when to access CYP input.[20] Gibson's proposal for dialogue in which no-one is viewed as an ultimate decision-maker echoes Burden's call to tackle a 'conspiracy of deafness', in which pupils with SEN are rendered powerless, passive recipients of specialist services.[21] Burden has proposed that a socially constructivist perspective on rights entails 'doing things *with* children rather than *for* or *to* them'.[22] Some of the ways in which this might be done are discussed in this paper.

Pragmatic benefits to adults

From a pragmatic standpoint, CYPs contribute insights that lead to better-informed educational decisions.[23] Roller, citing the influence of construct psychology on pupil participation,[24] has underscored potential disparity in how children and adults construct the world.[25] This mismatch of perception may restrict adult understandings of needs, negatively impacting decisions.[26] A plethora of studies illustrate the importance of the information that CYPs provide. For example, Armstrong, Galloway and Tomlinson found that pupils believed statutory assessments were to assess whether their 'brain was working', suggesting a limited sense of control over their lives. The authors proposed new participation frameworks after discovering that such 'metaperceptions' can affect CYPs' behaviour.[27] In a study by Sinclair

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[17] N Harris, 'Grievances, Disputes and Education Rights' in N Harris and S Riddell, *Resolving Disputes about Educational Provision: A Comparative Perspective on Special Educational Needs* (Ashgate, 2011).

[18] S Gibson, 'Beyond a "culture of silence": Inclusive education and the liberation of "voice"' (2006) 21(4) *Disability & Society* 315.

[19] M Young, *Knowledge and Control: New Directions for the Sociology of Education* (Macmillan, 1971); B Bernstein, *Class, Codes and Control Vol. 3: Towards a Theory of Educational Transmissions* (Routledge, 1975).

[20] P Freire, *Culture, Power and Liberation* (Macmillan, 1985).

[21] R Burden, 'Translating Values into Rights: Respecting the Voice of the Child' in G Lindsay and D Thompson, *Values into Practice in Special Education* (David Fulton, 1998), p 137.

[22] Ibid, p 141.

[23] S Wolfendale, *Special Needs in the Early Years: Snapshots of practice* (Routledge, 2000).

[24] Kelly's Personal Construct theory stresses the active way in which people create and modify unique internal models in response to their experiences. Ravenette developed techniques from these ideas to explore the individual constructs and expectations of children and young people and the underlying basis for their construction. G Kelly, *The Psychology of Personal Constructs. Volume One: Theory and Personality* (2nd ed.) (Routledge, 1955); A Ravenette, 'Personal Construct Theory: An approach to the psychological investigation of children and young people' in D Bannister, *New perspectives in Personal Construct Theory* (Academic Press, 1977).

[25] J Roller, 'Facilitating pupil involvement in assessment, planning and review processes' (1988) 13(4) *Educational Psychology in Practice* 266.

[26] Gersch, op cit n 12; Frederickson and Cline, op cit n 12.

[27] D Armstrong, D Galloway and S Tomlinson, *The Assessment of Special Educational Needs: Whose Problem?* (Longman, 1993), p 121.

Taylor, only the perceptions of pupils at a mainstream SEN 'inclusion' unit revealed that the setting fostered marginalisation.[28]

Pragmatic benefits to CYPs

Quicke has averred that 'inclusive philosophy requires us to see the pupil… as an agent… who can become independent, active and empowered'. [29] Jelly, Fuller and Byers see consultation as empowering to learners as they hear themselves discussing their needs.[30] Research frequently reports that CYPs with SEN prefer active participation and autonomy, often despite parental desire to be protective.[31]More recently, The Communication Trust reported CYPs' perspectives that 'the worst part is that they don't tell us' and 'I hate the fact that, that, some parents don't respect your choices'.[32] Fatania, Hagarty and Wong found that many students wished to attend annual review meetings, with most in Year 5 onwards attending. One pupil commented: 'I liked it because… it's about me… and no one knows me that well as I do so I had to be there and tell and say'.[33]

These stances from CYPs accord with some of the arguments in the literature on the cognitive, psychological and social benefits of affording pupils a tangible 'voice'. [34] Cheminais has averred that participation develops ownership of learning and motivation,[35] while others point to increased self-confidence and self-image.[36] Support comes from a meta-analysis by Test et al, in which students who were more involved in their annual review scored higher on measures of self-determination (perceived control over their own lives). For Test et al, participation develops decision-making skills and self-awareness, leading to increased assumption of responsibility and self-advocacy. [37] However, what the literature often lacks (and future research may benefit from) is exploration of how CYPs themselves consider their participation in educational decisions to have impacted their lives, through their skills, outlooks and self-perceptions.

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[28] A Sinclair Taylor, '"Less better than the rest": Perceptions of integration in a multi-ethnic special needs unit' (1955) 47(3) *Educational Review* 263.

[29] J Quicke, 'Educating the Pupil Voice' (2003) 18(2) *Support for Learning* 51, p 52.

[30] M Jelly, A Fuller and R Byers*, Involving Pupils in Practice: Promoting Partnerships with Pupils with Special Educational Needs* (Taylor & Francis, 2013).

[31] C Connors and K Stalker, *The Views and Experiences of Disabled Children and Their Siblings: Implications for Practice and Policy* (Jessica Kingsley, 2002); S Beveridge, 'Pupil participation and the home–school relationship' (2004) 19(1) *European Journal of Special Needs Education* 3; A Lewis and J Porter, 'Research and Pupil Voice' in L Florian, *Sage Handbook of Special Education* (Sage, 2007).

[32] The Communication Trust, 'Executive Summary: Exploring the involvement of children and young people with speech, language and communication needs and their families in decision making - a research project' (The Communication Trust, 2015), p 9: www.thecommunicationtrust.org.uk/media/443274/tct_involvingcyp_research_report_final.pdf, accessed April 2016.

[33] J Fatania, I Hagarty and B Wong, 'Eliciting Children's and Young People's Voices at Annual Reviews. A Review Across West Sussex' (West Sussex County Council, 2015), p 18: https://westsussex.local-offer.org/WestSussexCYPReport.pdf, accessed April 2016.

[34] H Shier, 'Pathways to participation: openings, opportunities and obligations' (2001) 15(2) *Children & Society* 107; G Whitty and E Wisby, 'Real decision making? Schools councils in action' (Department for Children, Schools and Families, 2007).

[35] R Cheminais, *Engaging Pupil Voice to Ensure that Every Child Matters: A practical guide* (Routledge, 2008).

[36] Gersch, op cit n 12; J Warner, 'Person-centred reviews: An exploration of the views of students and their parents/carers' (Doctorate thesis, University of East London, 2012).

[37] D Test, C Mason, C Hughes, M Konrad, M Neale and W Wood, 'Student involvement in individualized education program meetings' (2004) 70(4) *Exceptional Children* 391.

Barriers to participation

Previous studies note several barriers to effective participation. Norwich and Kelly studied pupil participation in SEN-related decisions in 18 schools, as well as consulting LAs in the SW SEN Partnership.[38] Adults perceived barriers pertaining to pupils, such as limited capabilities in cognition and communication. Pupils, however, reported staff-related concerns, including doubts over misinterpretation, confidentiality, token consultation or delays and disappointments in terms of outcomes, factors associated with what Lundy has termed *influence*.[39]

In a 2015 review across West Sussex, 42% of SENCOs and 46% of parents stated that older children had a place in the annual review and older pupils did express a preference to attend (although this attitude may specifically reflect enthusiastic study volunteers). However, 46% of parents commented that younger children may feel intimidated and lack the maturity to understand the review, and some young children did see attendance as daunting.[40] The DfE SEND Pathfinder Programme Evaluation identified the same perceived barriers of anxiety and limited understanding, particularly regarding younger children.[41]

Participation versus protectiveness

Linked to these findings, Norwich and Kelly identified a 'tension between participation and protectiveness', requiring a 'justifiable balance between genuine values'.[42] Staff expressed concern that placing responsibility on pupils might cause anxiety, and highlighting perceived weaknesses might threaten self-esteem; LAs reported that some parents refused to involve CYPs on these grounds. While principles of protectiveness align with the UNCRC, Percy-Smith and Thomas have averred that they can be abused, and supporting CYP participation will most effectively secure protection.[43] Healy has recommended a transparent, accountable system when justifying limits because of protectiveness.[44]

Concerns about genuine participation

The 'moral crusade' for CYPs' participation has prompted critique.[45] For Lewis, 'the rush to hear such voices masks the danger of being insufficiently careful' about how to hear them.[46] This echoes concerns about 'crude questionnaires,'[47] 'surface compliance',[48] and the

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[38] B Norwich and N Kelly, 'Evaluating children's participation in SEN procedures: Lessons for educational psychologists' (2006) 22(3) *Educational Psychology in Practice* 255.
[39] Lundy, op cit n 13.
[40] Fatania, Hagarty and Wong, op cit n 33.
[41] Department for Education, op cit n 11.
[42] Norwich and Kelly, op cit n 38, p 269.
[43] B Percy-Smith and N Thomas, *A Handbook of Children and Young People's Participation: Perspectives from theory and practice* (Taylor & Francis, 2009).
[44] K Healy, 'Participation and child protection: The importance of context' (1998) 28(6) *British Journal of Social Work* 897.
[45] A Lewis, 'Silence in the context of "child voice"' (2010) 24(1) *Children & Society* 14, p 14.
[46] Ibid, p 20.
[47] Ibid, p 16.

disregard of invited views.[49] Norwich and Kelly have noted pupil wariness of this,[50] and indeed, Fatania, Hagarty and Wong found that pupils who were keen to participate saw questionnaires as obvious and patronising.[51]

Some critics have held language in policy documents to account for inconsistencies in genuine participation, which are reflected in Hart's eight-step ladder of participation (from manipulation, through tokenism, to pupil-guided outcomes).[52] Norwich has suggested that problems stem from ambiguity in terms such as 'have regard' and 'involvement'.[53] Codes of Practice do not tend to elucidate on those different aspects of participation that Lundy's model has drawn out and clarified. Another concern is that vague limitations based on maturity and capability in Codes of Practice are used to justify limits on participation,[54] channeling 'troublesome voices into safe waters'.[55]

Another key point about responding to policy documents is that the drive to facilitate voice must be tempered with a respect for 'hearing' silence, and there is a danger that over-formalising policy initiatives may lead to CYPs feeling uncomfortable pressure to respond.[56] Lewis has also emphasised a need to encompass CYPs outside the 'subset whose personal circumstances privilege their voices.'[57] Some individuals (with limited linguistic capabilities etc.) are not in a position to redress misinterpretation.[58]

Facilitating methods

A key barrier to effective CYPs' participation is a paucity of suitable methods to elicit views.[59] A range of communication strategies have been developed to support CYPs.[60]

Fatania, Hagarty and Wong have suggested that there is no one-size-fits-all approach and recommended diverse degrees of support and modes of communication. They reported preferences for activity over talk, while noting the advantages of picture cards and scales in aiding verbal communication. The research participants (pupils, parents and SENCOs) stressed the importance of informal settings and existing, trusting relationships with staff.

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[48] J Rudduck and M Fielding, 'Student voice and the perils of popularity' (2006) 58(2) *Educational Review* 219, p 228.

[49] Lewis and Porter, op cit n 31.

[50] Norwich and Kelly, op cit n 38.

[51] Fatantia, Hagarty and Wong, op cit n 33, p 9.

[52] R Hart, *Children's Participation: From Tokenism to Citizenship* (UNICEF International Child Development Centre, 1992).

[53] B Norwich, 'Recognising value tensions that underlie problems in inclusive education' (2014) 44(4) *Cambridge Journal of Education* 495.

[54] S Gibson, op cit n 18; R Rose, 'Including Pupils: Developing a partnership in learning' in C Tilstone, L Florian and R Rose, *Promoting Inclusive Practices* (Routledge, 1998).

[55] D Armstrong, 'Reinventing "inclusion": New Labour and the cultural politics of special education' (2005) 31(1) *Oxford Review of Education* 135, p 141.

[56] Lewis, op cit n 45.

[57] A Lewis, 'Disabled Children's "Voice" and Experiences' in S Haines and D Ruebain, *Education, Disability and Social Policy* (The Policy Press, 2011), p 100.

[58] N Grove, K Bunning, J Porter and C Olsson, 'See what I mean: Interpreting the meaning of communication by people with severe and profound intellectual disabilities' (1999) 12(3) *Journal of Applied Research in Intellectual Disabilities* 190.

[59] Frederickson and Cline, op cit n 12.

[60] J Ware, 'Ascertaining the views of people with profound and multiple learning disabilities' (2004) 32(4) *British Journal of Learning Disabilities* 175.

SENCOs also saw value in helping pupils to build confidence, prepare and rehearse, suggesting that unanticipated questions could be off-putting. One SENCO rejected standard formats 'because we haven't got any standard students'.[61] Studies in SEN assessment and annual reviews have also noted 'voice bubbles',[62] visual methods,[63] one-to-one tutorials for drafting replies to open-ended questions[64] and multi-choice sentence endings.[65] The SEND Pathfinder Programme Evaluation reported positive parental and professional feedback when CYPs answered questions, showed pictures, or in one case delivered a PowerPoint presentation.[66]

Proposed methods do require careful evaluation: drawings can be ambiguous,[67] for example, and multi-choice formats, while reducing anxiety, may increase pressure to respond and limit accuracy. Research also suggests that a sense of pressure to give opinions can lead to acquiescence or 'yea-saying'. [68] A proposed safeguard is a 'mosaic approach', where confirmatory evidence is gathered through multi-methods.[69] This paper explores some of the methods used to elicit views in the mediation context.

Disputes and Mediation

Available research into pupil involvement in SEN mediation is limited to two linked papers: Soar, Burke, Herbst and Gersch[70] and Soar, Gersch and Lawrence.[71] This research indicated that CYPs rarely attended mediation. Echoing aforementioned studies, the research identified professional and parental concern about emotional risks and limited understanding, particularly among pre-teenagers. While LAs and mediators advocated indirect involvement (some employed questionnaires for CYPs), parents reported that they were left to instigate consideration of pupil views.

Importantly, the research suggested that parental perceptions of their child's views could be inaccurate. This supports the case for hearing directly from the child. Some parents proposed compulsory CYP participation and felt that LAs and mediators should approach CYPs directly. Soar, Burke et al (above) recommended clearer protocols to ensure CYPs'

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[61] Fatania, Hagarty and Wong op cit n 33, p 15.

[62] I Gersch, A Holgate and A Sigston, 'Valuing the child's perspective: A revised student report and other practical initiatives' (1993) 9(1) *Educational Psychology in Practice* 36.

[63] J Hayes, 'Visual annual reviews: How to include pupils with learning difficulties in their educational reviews' (2004) 19(4) *Support for Learning* 175; H May, 'Whose participation is it anyway? Examining the context of pupil participation in the UK' (2005) (32)1 *British Journal of Special Education* 29.

[64] Jelly, Fuller and Byers, op cit n 30.

[65] B Wade and M Moore, *Experiencing Special Education: What young people with special educational needs can tell us* (Open University Press, 1993).

[66] Department for Education, op cit n 11.

[67] J Dockrell, A Lewis and G Lindsay, 'Researching Children's Perspectives: A Psychological Dimension' in A Lewis and G Lindsay, *Researching Children's Perspectives* (Open University Press, 2000).

[68] Lewis and Porter, op cit n 31, p 227.

[69] A Clark and P Moss, *Spaces to play: More listening to young children using the mosaic approach* (National Children's Bureau Enterprises, 2005).

[70] K Soar, K Burke, K Herbst and I Gersch, (2005) 'Pupil involvement in special educational needs disagreement resolution: Some perceived barriers to including children in mediation' (2005) 32(1) *British Journal of Special Education* 35.

[71] K Soar, I Gersch and J Lawrence, 'Pupil involvement in special educational needs disagreement resolution: A parental perspective' (2006) 21(3) *Support for Learning* 149.

participation through a range of suitable methods, (incorporating pictures etc.) and suggested that advocates for CYPs could best separate pupil wishes from those of parents.

The findings of Soar, Burke et al could not be generalised due to the small sample size of interviewees (10 parents (all within the same LA), 5 mediators and 5 LA SEN officers). Despite this, the key issues raised regarding the 'extent of pupil involvement … and issues of best practice in this area warrant further study at both a regional and national level'.[72]

In recent research, Drummond interviewed parents and professionals in Wales and Northern Ireland to explore the reasons why child participation remains limited in SEN tribunals. Parents asserted that in discouraging attendance they were protecting children from adverse psychological consequences, linked to hearing their needs discussed, as well as the daunting, formal and adversarial setting. Many parents worried that foregrounding the child's view might undermine the prospect of an outcome in the child's best-interest.[73] Echoing earlier concerns,[74] Drummond noted 'pervasive attitudinal barriers'[75] within an 'entrenched cultural position' where measures of whether to bestow the right to participate are founded upon subjective notions of age and capacity.[76]

Best interest and capacity in disputes

Article 3 of the UNCRC states that 'the best interests of the child shall be a primary consideration' in all actions concerning children. Lundy has highlighted the conflict between participation and best interests in terms of CYPs' *influence*.[77] The Committee on the Rights of the Child (which monitors compliance with the UNCRC) has recognised that children are often reliant on others to ascertain and represent their best interests, while 'taking account of their views and evolving capacities'.[78] Whilst advocating participation, Gersch has argued that as children are still developing, 'professionals and other adults retain a duty of care to ensure the child's welfare and best interests rather than their immediate preference'.[79] Fortin (2009) has correspondingly argued that restricting children's choices is necessary to respect their future autonomy as adults.[80] This may entail decisions that children will come to welcome rather than choices they welcome immediately.[81] The view that best-interests should take precedence over children's wishes was expressed prevalently in the SEN dispute research by Drummond as well as Soar et al, which reported a frequent parental perception that 'at the end of the day… the parents should have the final say'.[82] Reflecting these findings, Dyer reported that parents considered that CYPs 'did not know any better' regarding the full

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[72] Soar et al, op cit n 70, p 41.
[73] O Drummond, 'When the Law is Not Enough: Guaranteeing a Child's Right to Participate at SEN Tribunals' (2016) 17(3) *Education Law Journal* 149.
[74] Gibson, op cit n 18; Rose, op cit n 54.
[75] Drummond, op cit n 73, p 160.
[76] Ibid, p 162.
[77] Lundy, op cit n 13.
[78] United Nations Committee on the Rights of the Child, General Comment 7 (2005) CRC/GC/7.
[79] I Gersch, 'Listening to Children' in J Wearmouth, *Special Educational Provision in the Context of Inclusion: Policy and Practice in Schools* (David Fulton, 2013), p 240.
[80] J Fortin, *Children's Rights and the Developing Law* (3rd ed.) (Cambridge University Press, 2009).
[81] D Archard, *Children: Rights and Childhood* (Routledge, 1993).
[82] Soar et al, op cit n 70, p 39.

implications of a mediation (parents were also concerned that LAs could over-emphasise the views of the CYP to justify lower levels of provision).[83]

Conversely, Lundy has argued that 'children's right to have their views given due weight cannot be abandoned on the basis that the adults in their lives know what is best for them'.[84] O'Mahoney has furthered the argument that CYPs' interests have been wrongly excluded in SEN disputes and that best interests may not align with parental preferences. For O'Mahoney, pupils may be better placed than any adult to speak on the most appropriate provision and parents can have an incorrect or incomplete view of their child's situation.[85] Harris concurs that the critical issue is whether the child's 'interests are properly protected… without the child's involvement, any decision may be less effective'.[86] O'Mahoney and Harris have suggested that CYP advocates (who can aid or relay the CYP voice) may be an essential way to guarantee that CYPs' views are featured when parents have unrealistic views of their child's educational needs.

This Study

This section outlines the process of data collection and analysis. This took place over 10 weeks in Spring 2016, at the Faculty of Education, University of Cambridge.

Rationale

The research took place roughly eighteen months after the new Code came into force (September 2014). The researcher identified a timely and important opportunity to investigate perceptions of the Code's initial impact in SEN mediation.

The only available studies into perceptions surrounding CYP views in SEN mediation are Soar, Burke et al and Soar, Gersch and Lawrence (noted above) in the mid-2000s, which offer useful touchstones for comparison. With major new emphases on it, this study aimed to present direct insights into CYP participation, exploring perceptions of barriers, facilitators and good practice. The findings may be beneficial to LAs, mediation providers and policy-makers as they continue to evolve and consider new approaches to the principles of the Code.

Research Questions and Epistemological Stance

The research aimed to explore perceptions about the implementation of the new Code in SEN mediation. The following research questions were identified:

(1) How do parents and professionals feel about CYP participation in mediation?
(2) How, and to what extent, does CYP participation currently take place in mediation?
(3) What are some of the perceived barriers and facilitators to CYP participation in mediation?

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[83] J Dyer, 'Searching for Breakdowns on the Diversion Routes from SEN Tribunals: An Exploration of Disagreement Resolution Processes' (Doctoral thesis, University of Exeter, 2009), p 38.
[84] Lundy, op cit n 13, p 938.
[85] C O'Mahoney, 'Special Educational Needs: Balancing the interests of children and parents in the statementing process' (2008) 20(2) *Child and Family Law Quarterly* 199.
[86] Harris, op cit n 17, p 20.

As the study is the first to explore this area since the implementation of the new Code, the epistemological stance and data-capturing approach needed to enable detailed inquiry, capable of exploring subjective experiences and views. The methodology was thus grounded in an interpretive paradigm, valuing the meaning in parents' and professionals' distinct interpretations of reality. This aligns with social constructionism, the assumption that 'reality' is unique to each individual.[87] Due to the paucity of research in this area, this approach was chosen over positivist approaches as it aimed to generate rather than confirm.[88] The research is phenomenological, striving to retain the original meaning of the data, rather than reduce it to measurable and controllable variables.[89]

The interpretive stance aims to produce a 'rich picture' of perspectives, indicating the suitability of the qualitative method. It enables the researcher to follow the lead of the participants and identify previously unconsidered phenomena.[90] Qualitative methods have been effectively deployed in research on pupil views and in studies of SEN mediation.[91] The approach was deemed conducive to contextual understandings of why participants perceive certain approaches as successful, thus enabling wide exploration of perceptions of good practice.

Semi-structured interviews

Semi-structured interviews are considered the 'exemplary method' of data collection in interpretive research, presenting opportunities for elaboration and modification to explore unanticipated themes.[92] The researcher prepared a semi-structured interview script which included a set of around 14 key qualitative questions specific to each targeted group. This was administered on-line, by telephone or face to face, depending on convenience for each participant. Interviews took up to one hour and were then transcribed so that all data could be coded in the same way. The researcher conducted a 'thematic analysis' on all answers, as this provides inductive, exploratory means of identifying themes within qualitative data. [93] Identified themes were refined, divided into constituent sub-themes and categorised according to content.[94]

The process of sampling parents and professionals is outlined in the Appendix.

Ethical factors

The researcher followed BERA Ethical Guidelines for Educational Research (2011) and endeavoured to follow Wolfendale's guidance for SEN research. This advises 'transparency,

[87] C Robson, *Real World Research: A Resource for Social Scientists and Practitioner-Researchers* (2nd ed.) (Blackwell, 2002).
[88] D O'Brien, *An Introduction to the Theory of Knowledge* (Polity Press, 2006).
[89] A Giorgi and B Giorgi, 'Phenomenology' in J Smith, *Qualitative Psychology: A Practical Guide to Research Methodology* (Sage, 2008).
[90] G Gibbs, *Analysing Qualitative Data* (Sage, 2007).
[91] Tennant et al, *Special Educational Needs Disagreement Resolution Services. National Evaluation Research Report DCSF-RR054* (DCSF, 2008).
[92] J Smith and M Osborn, 'Interpretative Phenomenological Analysis' in J.A. Smith, *Qualitative Psychology: A Practical Guide to Methods* (Sage, 2008), p 57.
[93] V Braun and V Clarke. 'Using thematic analysis in psychology' (2006) 3(2) *Qualitative Research in Psychology* 77.
[94] Gibbs, op cit n 90.

honesty and accountability' towards respondents asked to divulge personal information.[95] Sensitivity was especially required given that SEN disputes can cause great stress to families.[96]

All participants gave their informed consent after receiving an information sheet outlining the purpose and process of the research from the outset and, inter alia, confirming anonymity and researcher-only access to personal data and the voluntary nature of participation.

Findings

The coding process identified the following themes ('M-' indicates a mediator; 'P-' indicates a parent):

Theme 1: Positive professional attitudes to CYP participation

There was a prevalent view among mediators and LAs that 'involvement needs to be encouraged and promoted as a "norm"' (M-B). Some CYP, particularly teenagers, had 'very much taken the lead' in expressing their wishes. (M-D). Many mediators and LAs particularly approved of attendance because it 'empowers' CYP (M-F):

> 'The YP's involvement in the session is a powerful thing. The session in large part is about them, after all… the ability of the YP to… play a part in discussions has often stood out' (M-H)

> 'he needed more time to say things and process… he was engaged and positive… it was quite an inspiring experience' (M-H)

Although an attending role was typically seen as most appropriate for teenagers, mediators occasionally reported positive experiences of attendance with younger children:

> 'Children as young as 12 have attended… all have enjoyed the experience' (M-I)

> 'He was pleased to have the chance to speak [at age 11]' (M-G)

Mediators and LAs were often very positive about the pragmatic benefits of attendance in arriving at mutually satisfying solutions. Many interviewees placed a great deal of value on the unique contribution that CYP can make when present and suggested that this can result in different outcomes.

Some professionals also considered mediation an effective forum to work through disagreements between parents and CYP:

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[95] S Wolfendale, 'Research section: "Parents as partners" in research and evaluation: Methodological and ethical issues and solutions' (2003) 26(3) *British Journal of Special Education* 164, p 166.
[96] K Runswick-Cole, '"The tribunal was the most stressful thing: More stressful than my son's diagnosis or behaviour": The experiences of families who go to the Special Educational Needs and Disability Tribunal (SENDisT)' (2007) 22(3) *Disability & Society* 315.

'[the CYP] explained very eloquently why she had not wanted a plan previously but why she now agreed with her parents - contributed very well and meant that a decision could be reached about what was in her best interests' (LA-5)

While many parents would have concerns about the LA attempting to influence their child's view in the dispute, a small number of mediators proposed that attendance offers CYP a useful opportunity to hear the LA perspective, which could help them reach a more informed decision. One case was reported in which a parent

'perhaps overcoming a sense of protectiveness, was keen to give her son his own voice and he made his own mind up in mediation after hearing the LA officer' (M-H)

'The tension between wishes and feelings and the child's best interests is played out… mediation may be better equipped than other forums to meaningfully include the child's voice' (M-C)

However, there was a general view that in many cases attendance is not the most suitable option. In this case professionals emphasised that indirect participation, in which C/YP convey their views without attending, remains an important part of the process:

'For younger children where it may not be practical… it is always possible for them to express their wishes and feelings' (M-C)

'whilst direct involvement is the ideal, their indirect involvement is sometimes the most pragmatic approach' (M-F).

LA-2/P saw long-term advantages in CYP participation from a young age, suggesting early involvement may inculcate an understanding that improves the effectiveness of future participation efforts: 'getting their view is critical with young people, but it's critical earlier so that you can get them into the right place, to understand what the choices mean, and the consequences of the choices they're going to make'.

In summary, professionals were generally united in the opinion that participation can be empowering for CYP and should be encouraged as much as possible.

Theme 2: Differing parental attitudes to CYP participation

Parents presented very mixed attitudes towards direct attendance and indirect participation, with some enthusiastic and others feeling strongly that it would be inappropriate, particularly for younger children. Themes 6, 7 and 8 explore these views in detail.

Theme 3: Participation was not discussed

The strong sense of positivity towards CYP participation from the professionals in this study was not always reflected in parental experiences of LAs/ mediators:

'Neither the mediator nor the LA rep played any role at all in ensuring our daughter's views were considered' (P-A)

'We were disappointed with the local authority for not gathering our son's views or opinions… they would have been missed' (P-E)

'I felt that his views weren't really taken seriously and in a way was mocked for having unrealistic expectations' (P-C).

While parents who described experiences such as these were not in the majority, the number who were disappointed by professional efforts to enable participation was considerable. Reflecting the findings of Soar et al (2006) ten years ago, there is a clear disparity between the enthusiastic attitudes of LAs and mediators in this study and parental reports of limited or non-existent attempts by professionals to consider CYP views.

Theme 4: Tokenism as regards CYP participation

Some participants perceived perfunctory attempts to ostensibly elicit views: 'at present for whatever reason they are not engaged… genuine engagement… rather than something… tokenistic for the young person' (LA-6). Advocate-2 and Parent-J alluded to failure in areas which Lundy has conceptualised as *space* and *voice*, which refer to giving CYP the information required to participate, and tailoring methods to fully facilitate expression:

'Generally, it's a tokenistic effort. The LA… send a questionnaire out for parents to fill in…parents' knowledge and expertise in how to communicate with their child being marginalised… often due to timescales' (Advocate-2)

'that's the idea of the reforms isn't it but, you know, smiley face questionnaires are kind of what you get, whereas… staff haven't stepped back and thought "what's going on for this child? How can I really listen to what they're telling me?"' (P-J).

The perceived failure by professionals to take an individualistic and committed approach to participation is what comes across here, with a sense from parents that LAs did not aim to engage beyond the kinds of meretricious approaches that critics such as Ruddock and Fielding and Lewis have discussed with concern.

Theme 5: How does indirect participation occur?

Generally, CYP were reported to attend '*infrequently*' (M-I). Just as Soar et al (2006) found, parents often took the lead in conveying their child's views (in some cases at the explicit behest of the CYP). Discussion and separation of CYPs' wishes from those of the parents was also often encouraged by mediators:

'If they don't want to come I will check with parents first that they feel able to present their child's views to the meeting and if they feel there is a difference between their views and those of the child that needs to be shared' (M-D)

'We had discussed with him beforehand what we thought would happen and knew his views. We made it clear as far as possible that we were conveying what he thought as well as our opinions' (P-D)

> 'We felt this was a very important part of the process… we asked our son what would help him more at school and then presented his views along with photos of him to make the presentation very child-centred' (P-E).

Participants reported on the use of a variety of methods to facilitate CYP participation. A couple of mediation providers used their own questionnaires to discover the preferences of CYP and occasionally met with them: 'Mediation spoke to my child and gained her views face to face' (P-I). Letters and videos, produced with the CYP in a more relaxed setting, sometimes featured and were generally seen as effective. M-G felt that an angry letter from a CYP was unhelpful, except that it 'demonstrated the strength of feeling on his part'.

LA-2/P extolled the virtues of technology in appealing to CYPs' interests and encouraging participation when CYPs may not access traditional modes of communication (for a variety of reasons, either through choice or because of difficulties with that mode): 'a young person's view could be deemed effective through technology… they love technology'. LA-2/P described how an electronic tablet gave a CYP the confidence to relay essential new information. On another occasion, following completion of tablet survey, an autistic boy showed enthusiasm to participate and 'now felt ready for his annual review, when he hadn't been ready ever before… they felt that someone was actually trying to get their view for the first time ever' (LA-2/P). Professionals typically, alongside some parents, saw benefits in 'encouraging virtual attendance via… video conference… and more videos' (LA-5). Advocate-3 promoted methods such as 'Skype, by texting, by drawing, on video - the list should be endless'.

The sense that comes across in these examples, reflecting Theme 1, is that CYP participation has provided information that has been crucial to educational decisions. Yet here, the CYP may not have relayed their wishes and experiences without the aid of technology and therefore outcomes could have been very different.

Theme 6: Barriers to attendance

<u>Anxiety</u>

Every parent considered mediation to be a stressful experience for the CYP, and some decided attendance was inappropriate: '… his severe anxiety… meaning that he would not cope in a strange environment' (P-C). LA-2/P associated potential distress with young children in particular: 'Having a young child in mediation I think is not a bad idea, but I think it would be traumatic potentially'. LA-5 remarked that on one occasion, a very young child 'found it overwhelming and became upset'. Parent-E commented that their child 'dislikes meeting new people and the person representing the local authority had never met our son'. One CYP 'felt he couldn't handle it. His mum brought a video interview with him instead' (M-G).

P-G reported that the mediator tried to dissuade the parents from inviting the CYP because of the stressful setting, although the parents felt their child would be able to cope. However, there was a strong general feeling that mediation is always going to elicit stress, and in many cases anxiety levels for CYP would be too high for their attendance to be an option.

<u>Openly discussing needs</u>

Reflecting Drummond's findings and those of Soar, Gersch and Lawrence (above), there were concerns from parents and professionals about the negative impact of CYP hearing about their own needs, and that this might limit open discussion:

'We would not have been able to speak openly. We tend to use a positive approach with our son… only focus on the things he can do... the EHCP process forces parents to highlight all the things the child is struggling with - this is difficult to discuss in front of a child with very low self-esteem' (P-E)

'the LA didn't know what they could say and what they couldn't say… didn't want to use the word 'bullied' in front of an 11-year-old' (M-A)

'no young person wants to hear the things they cannot do but reality is that this is what triggers provision. Parents want to emphasise the negatives often for this reason, sometimes in a misguided belief about what delivers real outcomes. Essentially the [Children and Families] Act fails on these grounds' (LA-2/P)

This concern was less frequent than that of anxiety. However, the fact that it was raised by LAs, mediators and parents suggests that this 'participation versus protectiveness' issue - CYPs' exposure to sensitive discussions about their needs - has been prominent in conversations about the suitability of CYPs' attendance at mediation.

Formal procedures

Parents commonly felt that the formal context of the mediation posed considerable difficulties for CYPs. In a mediation over refusal to assess for an EHCP, P-D felt that their son did not speak because the issues relevant to him regarding potential provision were not a focus: 'He wanted to participate… the issues being discussed were procedural and practical and he had nothing to contribute to this'. Others considered the formal setting an unsuitable environment for CYP with complex needs. P-D, whose son had autism and attended mediation at the age of 17, reflected:

'Formal procedures inevitably present barriers. I think it is very important to include the young person affected, but he would have found it difficult to take in all the information because he is slow at processing and "switches off" after about 5 minutes'.

LA-2/P made the related suggestion that capacity is dependent on setting and that the mediation environment is not always conducive to effective contributions from CYPs:

'I know you assume the capacity, but that's not the same as being able to express your view in that setting… my daughter is very high-functioning… it's just not possible in one million years that she could present herself in any form of meeting, never mind mediation'.

This is linked to Harding's suggestion that capacity should be determined based upon each specific situation, rather than a global judgment on whether participation should occur.[97] LA-2/P echoed this: 'How can you assess someone's capacity to attend mediation, apart from going to mediation? You can't'.

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[97] E Harding, 'Obtaining the views of children with profound and multiple learning difficulties' (2009) 26(4) *Educational and Child Psychology* 117.

The above comments by P-D and LA-2/P also imply that the greater the special educational needs, the more difficult it may be for the CYP to overcome the barriers discussed and participate in the process.

<u>Timings</u>

The issue arose that mediation only takes place during standard working hours and CYP attendance would require time out of school. The length of mediations (up to 4 hours), also frequently emerged as a perceived barrier; many participants felt that CYP are often unable to concentrate for long enough to participate meaningfully in prolonged discussion. In one instance, the mediation session ended earlier than hoped when a CYP lost focus.

Theme 7: Barriers to any type of participation

<u>Unrealistic expectations</u>

A widespread concern among both parents and professionals was the risk that encouraging participation may risk raising CYPs' expectations that their wishes will be satisfied. Disputes are not always settled at mediation and any outcomes will be based on several factors. Parents and professionals identified the potential adverse psychological effects of this for the CYP as a reason to discourage participation.

This is linked to Lundy's concern that often CYP see little evidence of influence after being asked to participate in decisions, and that there is little transparency or subsequent explanation for the CYP about why certain steps were taken.[98] P-G described how mediation did not result in the desired outcome for their son: 'His views clearly didn't affect them at all… the LA staff listened but I feel that the LA went into the meeting knowing what result they wanted and that's what we got'. M-D and LA-4 stressed the importance of preparing CYP for the possibility that their hopes may not be acted upon and explaining why this may be the case.

<u>Understanding</u>

When asked about potential barriers, some mediators commented that some CYPs may lack the general understanding to take part in decision-making, and a small number of parents felt that their child had no self-awareness of needs and so should not be involved. For example, P-J considered that: 'when it's big decisions they're not always going to have the maturity or the understanding to know what's best for them' (P-J).

<u>Conflicting views: parents and CYPs</u>

While parents' and CYPs' views often aligned, professionals frequently expressed concern about how differing views were identified and addressed. As noted by Drummond and Soar, Gersch and Lawrence (above), there were reports of parents discouraging attendance,

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[98] Lundy, op cit n 13.

concerned that their child's view was not in the best interest and might present a barrier to accessing support. M-A recalled:

'parents didn't want him there because what he wanted was different from what they wanted and so they knew that if they brought him, the LA would latch onto that… the parents' view would be they know best for their children and even if they're close to adulthood, they'll still say "oh yes but he's got a learning disability"'.

Several mediators referenced CYPs' reluctance to claim support due to attached stigma. P-H articulated the view that such unwillingness was not in their child's best interests:

'My views did differ from my child. I dealt with this by not involving him in the process directly. My child did not want a statutory assessment because he does not want to have a disability and wants to be treated the same as all his peers… [not] looked at as "special". This causes reluctance in children to want to engage in a process which might lead to that label being applied to them'.

Differing views sometimes occurred between young people and their parents (for example, if a YP wanted to leave school after compulsory education). Here: 'If the YP is deemed to have capacity at that age then their… wishes and feelings would presumably count more than their parents' (M-D).

LA-2/P echoed the view that participation in decision-making must reach beyond those who are most able to share their voice.[99] This may involve inference when wishes are not explicit. LA-2/P focused on understanding the CYP position as discrete from that of the parents and working with parents to respond accordingly:

'If a young person writes "F off", I am not interested and that's it. [LA staff may] just ignore that, whereas it tells you a lot more than "I love geography". I had a [response] that more or less said that… that gave me the evidence with which to say the young man is not interested in further education, he's completely disengaged... he also wrote 'I want to work'. It took his parents 6 months to come around to it. He's now in an apprenticeship doing very well' (LA-2/P).

Unwillingness to participate

One parent of an autistic child raised a point related to pressuring the CYP into unwilling participation[100]: 'Why would they want to? They're not interested in that stuff' (LA-2/P)

Limited LA resources

LA-2/P emphasised that CYPs are '*ignored much of the time*' simply due to limited LA resources:

'it is less the fact that people do not have the will, the tools, the training or understanding of benefit but the fact that… LA staff have 250 cases to manage

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[99] Lewis, op cit n 45.
[100] Ibid.

each… at the end of the day it is a resource issue as well as a system/expertise issue'.

Theme 8: Facilitators

The interviews explored potential options for reducing barriers and increasing CYP participation going forward.

Advocates for CYPs

In cases where CYPs may struggle to communicate their views at mediation, some parents and mediators reported the use of a CYP advocate, often someone who knows the child well, to convey their wishes at mediation. M-H reported a case in which a YP

> 'didn't have capacity; we discussed with the parent who knew the YP best, and could most effectively communicate the YP's needs - it was agreed this was a combination of the carer and previous school's principal. … we would need to be reasonably sure that the person who played this role was someone the YP would open up to and be able to relate views objectively.*'*

This approach reportedly appealed to CYP when they knew the advocate:

> 'The YP did not want to comment but nominated 3 other people to speak for him' (Mediator D).

P-A reported that their child welcomed a 'one-page-profile' of views created with a family friend.

P-G and M-G referred to the positive sense of increased objectivity that an advocate can bring. MG said: 'It was very helpful because she'd convey his views in an objective way - it can make it easier for the LA to "hear" if it's from an independent supporter rather than the parent'.

In cases where parents have different views, or cannot advocate for their child, LA-2/P emphasised the need to:

> 'make sure that case officers understand that everybody should have an advocate from a certain age… if the situation indicates that the parent is unable to advocate or is not necessarily agreeing with the young person. They have to be taught how to watch the warning signs… [an advocate is] the only way that the mediator can be sure that the voice is being heard'.

The advocate was seen to have a key role in distinguishing the CYP's views from those of the parent, which would then allow any differences of opinion to be addressed in discussion. While a small number of parents felt that a CYP advocate would not be necessary as they knew what was best for their child, many parents actively welcomed or initiated steps to ensure CYP advocates became involved.

Reducing anxiety

Approaches for minimising anxiety, such as informal environments and constant clarification, were recommended. Such techniques were also reported as current practice, particularly by mediators reflecting on their own process. M-B highlighted that while the process could be intimidating for 'CYP's in scary formal meetings they do not understand', there are ways of

mitigating this: 'I try to offset this by making my sessions as informal as possible and ensuring appropriate support for the CYP'. LA-4 suggested that for CYP attendance to be successful, there would be a need for 'a clear outline… for the young person on what to expect'. For the son of P-D, 'although his autism and social phobia made it a very intimidating process he was able to cope with the mediation… where the rules and expectations were clear'.

M-D stressed the need to clarify the ways in which CYP views might be considered, to reduce the sense of pressure upon them: 'it is important that they understand… that their views are going to help us, but not that it all hangs on what they say - that is too much responsibility'.

Partial attendance

There was a sense among a couple of participants that CYP attendance in an informal part of the mediation is an effective way of overcoming barriers:

> 'They should only be bought in for part of the meeting. Mediators would need to be trained to gently seek their views without undue pressure' (P-H)

> 'I feel we have got it right by having the child in to part of the meeting if they want to come and are able to contribute' (M-D).

For M-G, altering procedures in response to CYP needs would not only help them to be included, but may also bring additional benefits that help to generate better outcomes:

> 'We can also consider how we structure mediation sessions so they are more accessible - e.g. breaking up into several shorter sessions… as opposed to a single session. It would also allow time for reflection and further actions (e.g. obtaining further information) before a mediated agreement is finalised'.

Flexibility and training

Most professionals conveyed a need for increased flexibility and collaboration with parents and pupils from the start, to consider protectiveness: 'The most appropriate approach will differ from YP to YP and the mediators need to work with the YP / parents / schools to establish what the right approach is' (M-H).

While it was suggested in Theme 4 that professionals do not always fully have regard to parents' knowledge about the best approaches to interacting with their children, the benefits of discussing options with both parents and CYP were outlined by M-B. Here, direct contact with the YP appears to have been crucial, allowing the mediator to provide a picture of the process and help them decide whether to attend:

> 'I was told by a parent that a YP probably would not be able to attend due to anxiety - when I spoke on the phone and encouraged her to attend, she did. Her contribution to the discussion was key to the outcomes being closest to what she wanted'.

When potentially conflicting views between CYP and parents arise, M-H reflected a need to identify and address them:

'we need to more thoroughly process map (with reference to the emphasis in the Code) how we ensure that the YP's voice is separated from, given emphasis (and, if necessary, reconciled with) the parent from the point of contact with our service' (M-H).

LAs and mediators felt that further training could promote flexibility and prior discussion to clarify the procedures for all involved to help decide upon the best participation options:

'A course covering good practice in engaging YP across the mediation process, including at the Mediation Advice phase. This might take account of the common effects of SEND (if it is possible to generalise) on a YP's ability to have a conversation. Perhaps also strategies to talk to parents who may (understandably) find it difficult to allow their child (who is often vulnerable) a fully independent voice' (M-H).

Discussion

Implications for practice

This small study has represented an early attempt to explore the implications of the new Code for mediation. Perceptions of good practice add new evidence to understandings of how best to support and involve CYP. The findings express a pervading view, echoing Jelly, Fuller and Byers, that being listened to is empowering for CYPs as it can crucially affect outcomes. The study identifies a greater commitment to CYP participation than was reported by Soar, Burke et al and Soar, Gersch and Lawrence (above), with evidence of positive practice in direct and indirect participation, and a good deal of professional reflection on ways to improve at this relatively early stage since the reforms.

There is evidently also a considerable way to go. Perceptions of tokenism are redolent of warnings against surface compliance in the literature. As noted by Soar, Burke and Lawrence, this study finds discrepancies between practices described by LAs and mediators and other reports that professionals did not discuss CYPs' views. Questions also exist about who should decide the most suitable level of engagement. While some parents clearly convey the distinct view of the CYP, others can reportedly restrict their influence in the mediation proceedings. While parents do this in the belief that it is the best way to attain the right provision, this study highlights that moving beyond reliance on parental advocacy may be essential to guarantee CYP voice. It will clearly not always be in the best interest of the CYP to act in accordance with his or her own wishes and this reality could potentially cause upset. Even in such cases, this paper develops the pragmatic arguments for participation by suggesting that underlying wishes and concerns could be incorporated into flexible solutions. For example, CYP concern about stigma and labelling could be reflected in arrangements to allay this; 'support should be discreet' (as one participant from IASS suggested), for example. Without giving such views due consideration, outcomes may be less mutually satisfactory for parents and CYPs. This approach may also help to realise the assertion by Drummond and Lundy that careful attention should be paid to the CYP's feelings, whether they are capable of forming a mature view or not.[101] Mediation, as an alternative forum to a confrontational 'win-lose', tribunal, may be particularly conducive to agreements and accommodations that

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[101] Drummond, op cit n 73, pp 160-161; Lundy, op cit n 13, p 935.

offer pleasing outcomes for all involved. As one mediator put it, the process may empower the CYP to 'become part of the solution'.

To ensure the principles of participation are realised, this article posits the following recommendations.

There is an ongoing need to work collaboratively with parents and CYP to support their understanding of the new Code and the implications for mediation. Everyone needs to understand the different levels and options for participation. Sometimes wishes will be implicit and professionals and parents will need to work together to interpret them. Parental knowledge and judgment is highly important but, equally, if parents are reluctant to include their child, the reasoning behind this should be carefully explored by professionals.

To help select the most appropriate approach for each CYP, individual 'plans for participation' could be created as standard practice, orienting the process around the CYP. This should be a collaborative process between mediators, LAs, parents and CYPs, presupposing as much involvement as possible, in line with the notion that capacity should initially be presumed.[102] Suggested modes of engagement should be evaluated, in keeping with Healy's call for an accountable system when justifying limits due to protectiveness. Tailored steps should be taken to identify how risks can be managed and accommodations made to ensure each CYP is fully supported. This includes help to 'understand what the choices mean' (LA-2/P), in accordance with Lundy's concepts of space and voice. When arriving at an outcome, and following this result, 'plans for participation' could include a space for LAs and mediators to document influence, i.e. how the CYP's wishes have been addressed. No CYP contribution, even if unconventional, should be disregarded without discussion – as this study has shown, ostensibly unhelpful remarks can provide useful information. The objective position of the mediator may place them in the best position to oversee 'plans for participation', although plans would ideally be viewed as a collective endeavor with input from LAs, parents and CYPs.

Any decision regarding the level of participation should account for CYPs' preference, which may in some cases mean no involvement.[103] The likelihood that the CYP will want to participate may be increased by attuning more closely to their preferences and interests.[104]. This view is supported by the findings of Norwich and Kelly, in which pupils viewed their own skepticism about genuine influence as a barrier to participation.[105] The recommendations of The Communication Trust may be useful to mediators and LAs in collaboration:

> 'There is a need for accessible, relevant and interactive information to support children's involvement in decisions. The materials need to convey information about the process of involvement, the possibility and expectation that children and young people have a part to play and clear information about how they can express their preferences and wishes.'[106]

In initial discussions, attendance should be considered. Participants frequently suggested that CYPs attend a more informal part of the mediation, if appropriate, and gave examples of this

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[102] United Nations Committee on the Rights of the Child, General Comment 12 (2009) CRC/C/GC/12; Drummond op cit n 73, p 158.
[103] Lewis, op cit n 45.
[104] The Communication Trust, op cit n 32.
[105] Norwich and Kelly, op cit n 38.
[106] The Communication Trust, op cit n 32, p 8.

working effectively. This would strike a balance between participation and protectiveness when parents and professionals judge that aspects of discussion could have a negative impact on the CYP. Offering discrete mediation in school may facilitate partial attendance.

A key recommendation is that all CYPs should be entitled to a non-parental advocate. Evidence of lost CYP voices in this study supports this view. A CYP advocate could be a standard norm to avoid estranging parents who may question their purpose. An advocate could meet with the CYP to discuss potential provision options and ascertain their wishes prior to the mediation, aiming to draw out the underlying reasons for the CYP's preferences so that these can form part of the discussions and potential mediation agreement. If the CYP attends the mediation, the advocate may assist them in conveying their feelings, or advocates may convey the views of CYPs who do not attend. Depending on the CYP, the advocate might be someone they know. Some CYPs find it difficult to communicate with new people outside trusting relationships, so an advocate would need to be a person the CYP can be open with and must additionally be able to relate views objectively.

Alongside this option, a range of methods is needed to elicit views. Expecting an anxious CYP to cope with a formal process might sometimes be unrealistic, but meeting CYP in their own environment and communicating in ways they are most comfortable with could make a positive difference. Varied methods of elicitation were viewed as powerful tools when attendance was not considered appropriate, particularly the use of technology. This research is not able to present firm conclusions about effectiveness of particular methods. However, as one mediator emphasised, a recognition that CYPs with SEN are not a homogenous group and an openness to flexibility is viewed as essential:

> 'If you have a fixed protocol for how you deal with these things it's not going to work at all: different ages, different situations, different parents, different everything. It's just being prepared to go in and not know what you're going to get and work with it really' (M-A)

With such multiplicity of experiences, there is a need for dialogue-based CPD, in which LAs and mediators can analyse previous decisions within contexts, share best practice and reflect on where CYPs continue to be left out. As one mediator commented: 'We've got to evolve, we've got to talk to each other about the cases we have, and be creative, I think' (M-A).

This echoes Peters' assertion that 'education is a continuous development through reflection on practice, followed by action, which in turn leads to further reflection. A necessary feature of praxis is dialogue.'[107] Professionals in the study expressed a desire for dialogue which is consistent with the kind propounded by Gibson, where complexities and challenges are 'not shied away from but engaged with', where terms such as 'participation' become 'more than mere buzzwords located in policy documents, and… all learn from and through each other'.[108] Indicating that this study has prompted professional reflection, one respondent noted: 'As I write this it occurs to me that we have not considered having the children back in again at the end to tell them of the decision… I am sure that this would sometimes have been appropriate' (M-H)

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[107] S Peters, 'Transforming disability identity through critical literacy and the cultural politics of language' in M Corker and S French, *Disability Discourse* (Open University Press, 1999), p 114.
[108] Gibson, op cit n 18, p 326.

This point is connected to Lundy's concern that often CYPs 'are asked for their views and then not told what became of them; that is, whether they had any influence or not'.[109] Lundy has stressed that CYPs should 'be told what decision was made, how their views were regarded and the reasons why action has proceeded in a certain way'[110]. Participants in this study expressed similar views about providing CYPs with clear explanations, not only following the outcome but throughout the mediation process to help mitigate anxiety and engender realistic expectations. Reports in this study, such as Advocate 3's comment that '*the* LA hasn't contacted [the CYP] to explain why', highlight the need to help CYPs understand why decisions are made, particularly if outcomes do not appear to explicitly reflect their wishes. Research with CYPs has linked participation to increased self-determination (e.g. Test et al) and told us that experiences or expectations of being ignored are a disincentive to participate (e.g. Norwich and Kelly). In SEN mediation, awareness that their views were considered, and how, is crucial if CYPs are to see themselves as agents and feel that it is worth participating in future decisions about themselves. Direct attendance would allow them not only to contribute but to see and be part of the process of embedding and integrating their views into outcomes. In cases of partial attendance or non-attendance, it may also be appropriate to update and consult the CYPs during the mediation, gaining their response to potential solutions that emerge.

Reflections and implications for research

Because of the timing of this study, it is hoped that the findings can usefully contribute to the research in this area, informing and stimulating discussion by mediators and LAs. The research questions explore a period (since the Code came into force) which has allowed tangible new approaches to be tried, tested and experienced. Yet, 'it is still early days' for the reforms (Advocate-1), promising exciting opportunities as ideas develop to further support CYP participation.

A potential limitation of this study, emerging from difficulties in accessing parents, is that the small sample may reflect certain parental attitudes and experiences that are not representative. Many parents, for instance, were dissatisfied with mediation outcomes and subsequently pursued an appeal. Parents who achieve resolution at mediation may be less active within online groups and therefore less accessible. Dissatisfaction may have a relationship with CYPs' views (some parents reported that they began an appeal after the LA failed to recognise CYPs' views), skewing the sample. Similarly, while the LAs were geographically diverse, particularly proactive LAs may have been be more likely to participate and these potential 'response biases' need to be considered. The research may have benefited generally from a larger sample size of parents and LAs given that only a small proportion from these respective groups participated.

It is also acknowledged that the findings focus considerably on the views of parents and mediators, relative to the other groups. While the small sample size of advocates partially accounts for this, more representation of LA views would have been desirable. This imbalance of attention reflects the fact that LA interviews were generally shorter and less detailed; many staff explained that they had high caseloads and were particularly time-poor during the implementation of the new SEND reforms. Beresford, Rabiee and Sloper have similarly identified that other priorities may override participants' ability to commit to

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[109] Lundy, op cit n 13 p 938.
[110] Ibid, p 939.

research[111]. The sampling of mediators prompts fewer concerns, as a high proportion of those practicing in England participated (and generally could give more time and detail) in comparison with LA and parent representation. The age range of CYP discussed was clearly wide.

Considering its central aim, a key shortcoming of this study is the non-inclusion of the views of CYPs, despite the growing paradigm approach to empower CYPs, seeing them as the experts[112] to redress power differentials.[113] This was a purely pragmatic rather than principled decision and the researcher made every effort to explore this possibility, although access to CYPs at the centre of SEN disputes proved impracticable. Involving CYPs in research requires flexible frameworks to facilitate individual-oriented approaches to data collection and consideration of ethical dilemmas such as gaining informed consent.[114] Given limited resources, collecting data with CYPs was, regrettably, beyond the scope of this study. The review of the literature demonstrates how adults cannot reveal a complete picture of CYPs' participation and that CYPs with SEN can make significant contributions to research on participation in educational choices. The researcher hopes that this success will carry through to further studies on mediation, exploring research questions along the lines of this study from the direct perspectives of CYPs.

The diverse participation in this study is redolent of Dervin's concept of 'circling reality', i.e. 'obtaining a variety of perspectives in order to get a better, more stable view of "reality" based on a wide spectrum'.[115] This perhaps does not fully reflect the considerable variation of situations and subjects in SEN disputes. Future research may benefit from alternative approaches such as realist evaluation[116]. According to Pawson and Tilley, 'realist evaluation asks not, "What works?" or, "Does this program work?" but instead, "What works for whom in what circumstances and in what respects, and how?"'[117] This may offer a more complex and nuanced picture, considering how solutions can incorporate CYPs' views in specific contexts. This aligns with Dervin's recommendation 'to posit... every contradiction, every inconsistency… as fodder for contextual analysis. To ask and re-ask what accounts for this difference or this similarity'.[118] The research was cross-sectional and did not explore longer-term outcomes of CYPs' involvement, or different perspectives on the same disputes. This presents possibilities for further research, which could provide stronger insights into the effectiveness of particular approaches to participation.

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[111] B Beresford, P Rabiee and P Sloper, 'Priorities and perceptions of disabled children and young people and their parents regarding outcomes from support services' (Social Policy Research Unit, University of York, 2007): www.fatherhoodinstitute.org/uploads/publications/344.pdf, accessed April 2016.
[112] J Davis, N Watson and S Cunningham-Burley, 'Learning the lives of disabled children: developing a reflexive approach' in P Christensen and A James, *Research with children: Perspectives and practices* (Falmer Press, 2000).
[113] R Davie, G Upton and V Varma, *The Voice of the Child: A handbook for professionals* (Falmer Press, 1996).
[114] P Alderson and V Morrow, *The Ethics of Research with Children and Young people: A practical handbook* (2nd ed.) (Sage, 2011); Lewis, op cit n 45.
[115] B Dervin, (1983), 'An overview of sense-making research: Concepts, methods and results' (paper presented at the annual meeting of the International Communication Association, Dallas, Texas, 1983), p 7: http://faculty.washington.edu/wpratt/MEBI598/Methods/An%20Overview%20of%20Sense-Making%20Research%201983a.htm, accessed April 2016.
[116] R Pawson and N Tilley, *Realistic Evaluation* (Sage, 1997).
[117] R Pawson and N Tilley, 'Realist Evaluation' (2004), p 2: http://www.communitymatters.com.au/RE_chapter.pdf, accessed April 2016.
[118] B Dervin, 'Given a context by any other name: Methodological tools for taming the unruly beast' in B Dervin, L Foreman-Wernet and E. Lauterbach, *Sense-Making Methodology Reader: Selected writings of Brenda Dervin* (Hampton Press, 2003), p 129.

Conclusions

The findings suggest that practices regarding CYPs' participation in SEN mediation are highly variable. There was strong professional belief in participation (particularly attendance, when possible) and its pragmatic benefits. There was a good deal of evidence of participation, although reportedly professionals did not always consider participation, or did so in a tokenistic way. Interviewees were also keen to promote facilitators such as partial attendance, advocacy, increased prior collaboration with parents/ CYP and diverse methods of communication, especially those incorporating technology.

Perceived barriers to attendance were particularly associated with younger children and included anxiety, formal procedures and concerns of negative psychological impact. General concerns about participation included the risk that CYPs' wishes could not be met and limited CYP understanding.

A key point to be drawn from this study is that CYPs' views can differ from those of parents. Some parents conveyed the CYP view, while others felt that this would be inappropriate. This is one reason why CYPs' views do not always feature in cases where they have the potential to contribute to mutually satisfactory solutions. This rationalises the call to create individual 'plans for participation' prior to mediation and to entitle CYP to advocates. Flexibility is seen as key to creating situations where, as Gibson has written, 'voices can sing and shout, whisper and float, where sharing of stories and experiences, thoughts and feelings, enable reflection, analysis and… action to occur'.[119]

Perhaps Gibson's call for a culture in which no-one seen as the ultimate decision-maker[120] could be described as idealistic in certain contexts, but this idea is useful and apposite in SEN mediation, in which parties work collectively to arrive at the own solutions. It challenges the view of the parent or professional as able to determine the circumstances in which CYPs are granted access to genuine participation. Lundy has proposed 'procedural safeguards which make the process more open and transparent and which create the conditions in which it makes it uncomfortable for adults to solicit children and young people's opinions and then ignore them'.[121] 'Plans for participation' might contribute to a necessary 'conceptual shift', as described by Drummond, towards 'adapting participative forums to enable those with varying degrees of capacity to engage'[122]. Such plans may also help to create a culture which places value on the belief (as held by many professionals in this study) that CYPs' views should be integral and embedded in outcomes, a driving force rather than 'minor footnotes in an unaltered adult text',[123] and where the first questions asked are always "what's going on for this child? How can I really listen to what they're telling me?"' (P-J).

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[119] Gibson, op cit n 18, p 326.
[120] Ibid, p 325.
[121] Lundy, op cit n 13, p 939.
[122] Drummond, op cit n 73, pp 160-161.
[123] M Fielding and M Prieto, 'The central place of student voice in democratic renewal: a Chilean case study' in M Schweisfurth, L Davies and C Haber, *Learning Democracy and Citizenship: International experiences* (Symposium, 2002), p 20.

APPENDIX

Sampling for Interviews

LAs: The researcher contacted SEND managers in 15 LAs, using purposive sampling to attain geographic diversity. Team members (predominantly SEND managers) from 8 LAs completed the interview, one of whom was also the parent of a child with SEN. One IASS (Information, Advice and Support Service) case worker was interviewed after referral by another LA. The researcher aimed to achieve a balance between wide-ranging perspectives and depth of data. Partially due to a limited timescale, a relatively small proportion of LAs in England were interviewed and the study may have benefitted from a larger sample. However, the achieved sample size reflects the goal of ascertaining a broad sense of how views and practices may differ, while capturing detail and avoiding superficial perspectives associated with high numbers of participants.

Mediators: Due to the relatively small number of mediation providers in England, it was possible to contact all mediation-providing organisations that could be found online. 14 were contacted and of these 9 professional mediators completed the interview, representing several organisations. Therefore, a good proportion of active mediators took part in this study and the sample of mediators can be viewed as more representative than that of other professionals and parents.

Parents: A purposive sample of parents who had experienced mediation in 2015/16 was required. As these parents represent a 'hidden' population that is more difficult to reach, initial invitations were posted on online parental support groups for EHCP processes. Some SEN charities also shared the invitations on social media. While this pragmatic approach enabled access to parents, potential limitations with regards to achieving a representative sample are explored in the 'Discussion'. 11 parents took part in the study.

Advocates for parents: Through the online parental groups, the study also received attention from independent advocates who are enlisted by parents to advise and support their case throughout the EHCP/ appeal process, including in meetings with the LA. Unlike the free IASS, these services are usually paid for by parents. It is also important to distinguish between this role and that of advocates for CYP, who convey CYP views rather than support parents. The researcher was aware that a new group of participants could divert attention away from original research aims.[124] However, an opportunistic sample of advocates (who have experienced several mediations) potentially offered interesting perspectives and overviews. 4 advocates for parents were interviewed.

Although efforts were made to include CYP, on pragmatic grounds this was not possible given the limited resources of this study. This shortcoming and the essential need for research in this area to include CYP is further considered in the 'Discussion' section.

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[124] J Creswell, *Educational Research: Planning, conducting, and evaluating quantitative and qualitative research* (4th ed.) (Pearson, 2012), p 209.